

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-6188

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA and ROBERT RAGONE,
Special Agent, Internal Revenue Service,
Petitioners-Appellees,

vs.

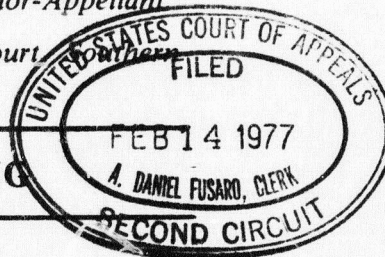
MANUFACTURERS & TRADERS BANK, (formerly First
Empire Bank—New York) and JAMES A. KYPRIOS, Vice
President, International Banking, Manufacturers & Traders
Bank,
Respondents,

ALLAN H. APPLESTEIN,

Proposed Intervenor-Appellant

*On Appeal from the United States District Court,
District of New York*

PETITION FOR REHEARING



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, et al

Petitioners-Appellees,

Docket No. 76-6188

vs.

MANUFACTURERS & TRADERS BANK, et al,

Respondents,

ALLAN H. APPLESTEIN,

Proposed Intervenor-Appellant.

PETITION FOR REHEARING

PRELIMINARY STATEMENT

Pursuant to Rule 40, of the Rules of Appellate Procedure, the Proposed Intervenor-Appellant, ALLAN H. APPLESTEIN ("Applestein"), petitions the court for rehearing of the appeal from the Order of the United States District Court denying leave to intervene, which Order was affirmed by the Judgment and Opinion of this Court dated the 31st day of January, 1977, and as grounds therefor says:

1. In affirming per curiam the order of the lower court, this Court overlooked and failed to consider that the constitutional right of privacy belonging to the Proposed Intervenor can be preserved only by allowing the proposed intervention.

2. The Court overlooked and failed to consider that the court below in effect rendered summary judgment against the Proposed Intervenor when the affidavits clearly showed that there was a genuine issue as to a material fact, viz. the "good faith" of the Internal Revenue Service, within the meaning of Donaldson v. United States, 400 U.S. 517(1971).

ARGUMENT

POINT I

THE CONSTITUTIONAL RIGHT OF PRIVACY
OF THE TAXPAYER CAN BE PRESERVED ONLY
BY ALLOWING THE PROPOSED INTERVENTION

This Court in affirming the decision of the District Court has failed to consider the taxpayer's constitutional right of privacy. It is the taxpayer's position that the denial of the right of intervention to a taxpayer for the purpose of objecting to an Internal Revenue Service third-party civil summons which seeks records of his confidential relationship with a bank, is an unreasonable infringement of his civil rights and his rights of privacy where, as here, the taxpayer has made a prima facie showing of an improper purpose for the issuance of the summons, and where the taxpayer is not permitted an evidentiary hearing or the right to cross examine.

Section 1205 of the 1976 Tax Reform Act (Internal Revenue Code Section 7609) has codified the taxpayer's right of intervention under facts identical to those in the case at bar.

Congress recognized not only the desirability of such a right to intervene, but as reflected in the legislative history of this Section, it recognized the possible constitutional requirement of such a right.

The Senate explanation of the 1976 Tax Reform Act in discussing Section 1205 recognizes and discusses the taxpayer's right of privacy. The Report, Public Law 94-455, states at p. 901:

"The use of the administrative summons, including the third-party summons, is a necessary tool for the IRS....On the other hand, the use of this important investigative tool should not unreasonably infringe on the civil rights of taxpayers, including the right of privacy." (emphasis added)

How can the taxpayer prove that the use of the summons has unreasonably infringed his civil rights, unless he is first permitted to intervene?

The right of privacy and its origins were discussed in Griswald v. State of Connecticut, 381 U.S. 479 (1965). There, the Court found that "various guaranties create zones of privacy" making particular reference to Amendments 1, 3, 4, 5, 9 and 14.

In United States v. Coopers & Lybrand, 413 F.Supp 943 (D.C. Col 1975) the taxpayer was permitted to intervene over the objection of the Internal Revenue Service ("IRS"). The Court recognized the taxpayer's right of privacy as a protectable interest warranting intervention, even in light of United States v. Donaldson, 400 U.S. 517 (1971).

The records subpoenaed in Coopers & Lybrand, supra, were the records of the taxpayer, Johns-Manville Corp. These records were ultimately held to be irrelevant and the Court denied the Petition

for Enforcement of the IRS Summons. Significantly, the taxpayer did not own the records sought in the Coopers & Lybrand case. However, the Court permitted the taxpayer to intervene because it had a "protectable interest" in those records. The Taxpayer's interest derives not from ownership of the papers, but from his right to privacy and the possible abuse thereof by an improper summons.

A denial of the right of intervention would, in most cases, in a very real and practical sense, preclude the opportunity to assert defenses to an improper summons. Even though the records are owned by a third-party, it is the taxpayer's right of privacy that is being invaded and only he can be expected to protect that right.

POINT II

A SUBSTANTIAL QUESTION OF FACTS
EXISTS AS TO THE PROPRIETY OF
THE IRS SUMMONS WHICH CAN ONLY
BE DETERMINED UPON A FULL HEARING

The District Court, in denying Applestein's application to intervene, found that the Summons had been issued in good faith. Accordingly, it decided that Applestein's right to intervene was foreclosed by the holding of the Supreme Court in Donaldson v. United States, 400 U.S. 517(1971). However, the Donaldson Court in discussing the decision of Reisman v. Caplin, 375 U.S. 440(1964), recognized the necessity of permitting a taxpayer to intervene in a proceeding to enforce an IRS summons, where "material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution" (P.530). Since a summons may only be used for civil purposes, any summons issued for the purpose of developing evidence in connection with a criminal investigation would be issued in bad faith. See United States v. Wall Corp., 475 F.2d 893(D.C. Circuit, 1972).

Although Donaldson did not grant to a taxpayer an absolute right to intervene, it did make clear that such right should be granted where a Summons is issued in bad faith, i.e. for criminal purposes as opposed to civil purposes.

The Court below, in determining that the issuance of the summons in this case was in good faith has made a factual deter-

mination of a seriously disputed issue of fact without any opportunity being afforded to the taxpayer to take any testimony or to make any inquiry. It would also appear that in making such a determination the Court below failed to recognize that issuance of a Summons for a non-civil purpose is sufficient to warrant a finding of bad faith. This Court in affirming that decision, also overlooked the fact that the use of a Summons for criminal purposes is a bad faith use. At the same time, by affirming the decision of the District Court, this Court, in effect condoned a summary determination of facts and has prevented the taxpayer from obtaining a hearing on the issue of good faith and the purpose for which the Summons was issued.

This Court has erroneously concluded that a taxpayer who seeks to intervene in an enforcement proceeding on the grounds that the summons has been issued in bad faith for an improper purpose must prove his case on the merits before he will be permitted the procedural remedy of intervention. Such an interpretation of Donaldson violates the taxpayer's right to due process and his right to cross examine the persons submitting affidavits in support of the position of the IRS. Moreover, it places a taxpayer in an impossible position reminiscent of "Catch-22" since he is not permitted to intervene unless he can prove his case and he can't prove his case unless he can intervene.

Applestein has been precluded from intervening solely on the basis of unsupported assertions of several IRS agents that Applestein is the subject of a dual "civil-criminal investigation". No supporting

documentation or statements were submitted to corroborate this conclusion.

Applestein, on the other hand has submitted sworn statements of two attorneys that Robert Ragone, the IRS agent who issued this Summons had stated that the investigation was "strictly criminal".

In addition, Applestein's accountant stated that he was advised by the Revenue Agent that the Field Audit was completed and that a final report would be forthcoming shortly, leaving him with the impression that the investigative phase of the Civil Audit was completed in April, 1975, a few weeks prior to the time the government claims that the "joint investigation" commenced. Applestein further relied on notices from the IRS advising that he was under investigation for criminal violations of the tax laws.

On the basis of these facts and in the absence of any specific countervailing evidence, at the very minimum, there has been presented to this Court a substantial question of fact as to the propriety of the issuance of the summons which can only be determined upon a full hearing. Whether the current IRS investigation in this case is civil or criminal in nature is not susceptible of summary resolution upon affidavits. Applestein has made a prima facie showing that the petition was issued for an improper purpose, i.e., a criminal investigation and therefore in bad faith. Justice requires that a hearing be held to determine the facts. The Government will suffer no damage if such a hearing is held. Applestein will forever be foreclosed from protecting his right of

privacy if a hearing is not held. See United States v. Sahley, 526 F.2d 913(5th Cir., 1976) where the Court, at a trial of a taxpayer, refused to allow him to contest the admissibility of evidence obtained by means of an allegedly improperly used Summons.

If there is any possibility that Applestein is correct and that the Summons has been issued in bad faith, in violation of the statutory authority of IRS, Applestein should be given a reasonable opportunity to ascertain the truth in a traditional confrontation with the witnesses against him. Only he is able to protect his right of privacy. The Bank will not, nor could it do so adequately if it wanted to.

Congress made this right absolute as of March 1, 1977. Why should this Court do less in February, 1977? A grant of intervention is wholly in accord with Donaldson which approves such a course as desirable in appropriate circumstances.

A prima facie showing of bad faith having been made, intervention is here certainly appropriate.

BALLON, STOLL & ITZLER
Attorneys for Allan H. Applestein
Office and P.O. Address
1180 Avenue of the Americas
New York, New York 10036

By: Morton S. Robson
Morton S. Robson

CERTIFICATE OF GOOD FAITH

I DO HEREBY CERTIFY that the within and foregoing Petition for Rehearing and Memorandum in Support, has been filed in good faith and not for the purpose of delay.

Morton Slobson

Morton S. Robson

federal FEDERAL COURT
SECOND CIRCUIT

UNITED STATES OF AMERICA and ROBERT RAGONE,
Special Agent, Internal Revenue Service,
Petitioners-Appellees,

- against -

MANUFACTURERS & TRADERS BANK, (formerly first
Empire Bank-N.Y.) and JAMES A KYPRIOS, Vice
President, International Banking, Manufactureres &
Traders Bank,
Respondents,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York.

That on the 14th day of Feb. 19 77 at One St. Andrews Plaza
New York, N.Y.

deponent served the annexed

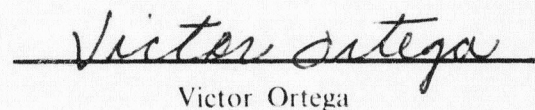
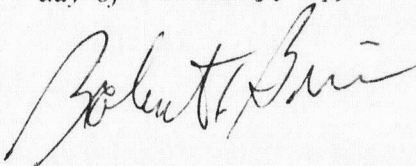
upon

Petition

Asst. Atty.-So. Dist.
Ken Stauffer j

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 14th
day of February, 19 77


Victor Ortega

ROBERT T. BRIN
J. C. State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977